

1
2 UNITED STATES DISTRICT COURT
3 EASTERN DISTRICT OF WASHINGTON
4
5

6 MARY S. THUILLARD,
7 Plaintiff,
8 v.
9 UNITED STATES OF AMERICA,
10 Defendant.

11 No. CV-04-0368-FVS
12

13 ORDER GRANTING DEFENDANT'S
14 MOTION FOR SUMMARY JUDGMENT
15 AND DENYING PLAINTIFF'S
16 MOTION FOR SUMMARY JUDGMENT
17

18 **THIS MATTER** comes before the Court on the parties' motions for
19 summary judgment on Plaintiff's remaining claim of malicious
20 prosecution. Plaintiff filed her motion for summary judgment on May
21 5, 2008. (Ct. Rec. 94). Defendant filed its cross-motion for summary
22 judgment on June 6, 2008. (Ct. Rec. 113). The motions were noted for
23 hearing without oral argument. Plaintiff is proceeding pro se.
24 Defendant is represented by Andrew S. Biviano.

25 **BACKGROUND**

26 Plaintiff Mary Thuillard was a Senior Customs Inspector for the
United States Customs Service (now U.S. Customs and Border Protection)
("Customs") in Frontier, Washington from February 1994 to February
2003. In the Fall of 2000, Customs received information that at some
time in 1998 Mrs. Thuillard may have allowed printer ink to enter the
United States without payment of proper Customs' duties and/or fees.

On April 10, 2002, before Internal Affairs completed its investigation, a federal grand jury indicted Mrs. Thuillard in the United States District Court, Eastern District of Washington. The indictment charged Mrs. Thuillard with fraudulently and knowingly concealing and facilitating the transportation of merchandise (ink) imported contrary to law, in violation of 18 U.S.C. §§ 545 and 2.

Pursuant to its own regulations, Customs suspended Mrs. Thuillard indefinitely. Customs also suspended its administrative investigation pending a final determination in the criminal case. Mrs. Thuillard appealed Customs' decision to indefinitely suspend her to the Merit Systems Protection Board ("MSPB"), but, on her request, the hearing was dismissed without prejudice and with leave to refile, pending the resolution of the criminal case. On September 9, 2002, the district court dismissed the indictment against Mrs. Thuillard.

Shortly thereafter, Customs returned Mrs. Thuillard to pay status, but then placed her on administrative leave while it considered whether further administrative action or investigation was warranted. On February 4, 2003, Customs Internal Affairs agents interviewed Mrs. Thuillard in an attempt to determine whether she had violated the U.S. Customs Code of Conduct. On February 5, 2003, Mrs. Thuillard submitted a letter of resignation.¹ Thereafter, Mrs. Thuillard filed no further claim or complaint with the MSPB. In August 2003, Mrs. Thuillard submitted a Claim for Financial Damages with Customs. That claim was denied on April 5, 2004.

¹Plaintiff acknowledges Mary Thuillard resigned, but alleges she resigned "under extreme duress and harassment designed to force her to resign."

1 Donald and Mary Thuillard, filed this action against Defendant,
2 alleging its supervisors and agents maliciously prosecuted Mrs.
3 Thuillard and thereafter maliciously and wrongfully pursued an
4 administrative investigation against her. Specifically, Mrs.
5 Thuillard alleges she was falsely and unfairly accused of misconduct
6 arising from her employment and unfairly interrogated by Customs over
7 those allegations of misconduct. Plaintiff also appeared to assert
8 additional causes of action for defamation, malicious harassment,
9 false accusation, and wrongful discharge. Plaintiff's Amended
10 Complaint also asserted additional claims for constructive discharge
11 and emotional distress. (Ct. Rec. 33). Plaintiff alleged Donald and
12 Mary Thuillard suffered financial difficulties and sought (1) monetary
13 compensation in the amount of \$28,578,600.00, (2) a letter
14 acknowledging that Mrs. Thuillard's employer took inappropriate
15 actions, (3) a correction to Mrs. Thuillard's employment records
16 reflecting that she "retired" instead of "resigned", and (4) to have
17 Mrs. Thuillard's old badge returned to her mounted on a plaque. (Ct.
18 Rec. 1).

19 On January 26, 2006, the Court entered an order granting
20 Defendant's September 21, 2005 motion to dismiss and closed the file.
21 (Ct. Rec. 58). Plaintiff subsequently appealed, and the Ninth Circuit
22 affirmed in part and reversed in part. (Ct. Rec. 74). The Ninth
23 Circuit concluded the Court erred by dismissing Plaintiff's malicious
24 prosecution claim. Accordingly, Plaintiff's only remaining allegation
25 is that Customs supervisors and agents maliciously prosecuted Mary
26 Thuillard.

1 On March 28, 2008, Defendants moved to dismiss Plaintiff Donald
2 Thuillard due to a lack of standing. (Ct. Rec. 81). On August 6,
3 2008, the Court granted Defendant's motion to dismiss Plaintiff Donald
4 Thuillard from this lawsuit. (Ct. Rec. 126).

5 Now before the Court are the parties' cross motions for summary
6 judgment on Plaintiff's sole remaining claim, the claim that she was
7 maliciously prosecuted by Customs supervisors and agents.

8 **DISCUSSION**

9 **I. Summary Judgment Standard**

10 A moving party is entitled to summary judgment when there are no
11 genuine issues of material fact in dispute and the moving party is
12 entitled to judgment as a matter of law. Fed. R. Civ. P. 56; *Celotex*
13 *Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 2553, 91 L. Ed.
14 2d 265, 273-74 (1986). A material fact is one "that might affect the
15 outcome of the suit under the governing law[.]" *Anderson v. Liberty*
16 *Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202
17 (1986). A fact may be considered disputed if the evidence is such
18 that the fact-finder could find that the fact either existed or did
19 not exist. See *id.* at 249, 106 S.Ct. at 2511 ("all that is required
20 is that sufficient evidence supporting the claimed factual dispute be
21 shown to require a jury . . . to resolve the parties' differing
22 versions of the truth" (quoting *First National Bank of Arizona v.*
23 *Cities Serv. Co.*, 391 U.S. 253, 288-89, 88 S.Ct. 1575, 1592, 20
24 L.Ed.2d 569 (1968))).

25 The party moving for summary judgment bears the initial burden of
26 identifying those portions of the record that demonstrate the absence

of any issue of material fact. *T.W. Elec. Service, Inc. v. Pac. Elec. Contractors Assoc.*, 809 F.2d 626, 630 (9th Cir. 1987). Only when this initial burden has been met does the burden of production shift to the nonmoving party. *Gill v. LDI*, 19 F. Supp. 2d 1188, 1192 (W.D. Wash. 1998). Inferences drawn from facts are to be viewed in the light most favorable to the non-moving party, but that party must do more than show that there is some "metaphysical doubt" as to the material facts. *Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574, 586-87, 106 S.Ct. 1348, 1356, 89 L. Ed. 2d 538, 552 (1986).

Here, the facts upon which the Court relies are either undisputed or established by evidence that permits but one conclusion concerning the fact's existence.

II. Analysis

Plaintiff argues that she is entitled to summary judgment on her claim of malicious prosecution because she has submitted evidence demonstrating all elements of the claim. (Ct. Rec. 95). Defendant contends it is not liable, as a matter of law, for Plaintiff's malicious prosecution claim because Plaintiff is not able to establish that the prosecution of Mrs. Thuillard lacked probable cause or was instituted through malice. (Ct. Rec. 114 at 4).

The rule in Washington State is that, in order to succeed on a claim of malicious prosecution, Plaintiff must establish the following elements:

(1) that the prosecution claimed to have been malicious was instituted or continued by the defendant; (2) that there was want of probable cause for the institution or continuation of the prosecution; (3) that the proceedings were instituted or continued through malice; (4) that the proceedings terminated on the merits in favor of the plaintiff, or were abandoned; and (5)

1 that the plaintiff suffered injury or damage as a result of the
2 prosecution.

3 *Clark v. Baines*, 150 Wash. 2d 905, 911, 84 P.3d 245, 248 (2004)
4 (citing *Hanson v. City of Snohomish*, 121 Wash. 2d 552, 558, 852 P.2d
5 295 (1993)). At issue in this case are the second and third elements
6 of a malicious prosecution claim. The undersigned finds that
7 Plaintiff's claim fails, as a matter of law, because she is not able
8 to establish that the prosecution of Mrs. Thuillard lacked probable
9 cause or was instituted through malice.

10 **A. Probable Cause**

11 Defendant contends that Plaintiff is not able to overcome the
12 presumption in favor of probable cause created by the grand jury
13 indictment in this case. Defendant asserts that even if one were to
14 accept all of Plaintiff's evidence as genuine, Plaintiff still lacks
15 any actual evidence that false testimony was knowingly and
16 intentionally provided to the grand jury.

17 "Probable cause exists where the facts and circumstances within
18 the arresting officer's knowledge and of which he has reasonably
19 trustworthy information are sufficient in themselves to warrant a *man*
20 *of reasonable caution* in a belief that an offense has been or is being
21 committed." *Bender v. Seattle*, 99 Wash. 2d 589, 597, 664 P.2d 492,
22 502 (Wash. 1983) (emphasis in original). This is an objective
23 standard that may be applied in Washington State by a jury or a judge.
24 *Id.* A finding that a reasonable person would believe that an offense
25 has been committed establishes probable cause and is an "absolute
26 defense" to a claim of malicious prosecution. *Clark*, 150 Wash. 2d at
912, 84 P.3d at 249. In cases like this one, in which probable cause

1 was determined by a grand jury rather than the defendant, a plaintiff
2 must meet an even higher bar in order to make a *prima facie* case.

3 The United States Supreme Court has established that a grand jury
4 indictment is a sufficient basis for a finding of probable cause.

5 *Federal Deposit Insurance Corp. v. Mallen*, 496 U.S. 230, 241 (1988)
6 (stating "[a] grand jury had determined that there was probable cause
7 to believe that appellee had committed a felony. Such an *ex parte*
8 finding of probable cause provides sufficient basis for an arrest. .

9 ."). See, also, *Kalina v. Fletcher*, 522 U.S. 118, 129 (1997) (stating
10 that "[t]he Fourth Amendment requires that arrest warrants be based
11 upon probable cause . . . a requirement that may be satisfied by an
12 indictment returned by a grand jury") (internal quotations omitted);
13 *Gilbert v. Homar*, 520 U.S. 924, 934 (1997) (stating that indictment by
14 an independent third party indicates that the arrest and formal
15 charges were not arbitrary). The Ninth Circuit has also determined
16 that in a federal criminal prosecution in which a grand jury finds
17 probable cause, a presumption is created in favor of the malicious
18 prosecution defendant that probable cause existed for the underlying
19 prosecution. *McCarthy v. Mayo*, 827 F.2d 1310, 1316 (9th Cir. 1987),
20 *Conrad v. United States*, 447 F.3d 760, 768 (9th Cir. 2006).

21 While there is no Washington State case law concerning grand jury
22 indictments, the presumption articulated by the Ninth Circuit is
23 consistent with the parallel Washington rule in situations in which
24 the prosecutor determines probable cause. *Bender*, 664 P.2d at 500
25 ("If it clearly appears that the defendant, before instituting
26 criminal proceedings against the plaintiff, made to the prosecuting

1 attorney a full and fair disclosure, in good faith, of all the
2 material facts known to him . . . probable cause is thereby
3 established as a matter of law" and operates as a complete defense to
4 a malicious prosecution claim).

5 **1. Dismissal of Indictment**

6 As a result of United States Customs Service Senior Special Agent
7 Paul Anderson's ("SSA Anderson's") testimony, the grand jury returned
8 a two-count indictment against Mrs. Thuillard in the United States
9 District Court, Eastern District of Washington. Count 1 of the
10 indictment charged that Mrs. Thuillard knowingly admitted into the
11 United States goods, wares and merchandise, upon payment of less than
12 the amount of duty legally due, in violation of 18 U.S.C. § 543 and §
13 2. Count 2 charged that Ms. Thuillard knowingly concealed and
14 facilitated the transportation of merchandise imported contrary to
15 law, in violation of 18 U.S.C. § 545 and § 2. (Ct. Rec. 116 ¶ 29).

16 Mrs. Thuillard moved to dismiss the indictment but did not
17 dispute that she imported the ink or failed to pay any duties or fees.
18 Rather, Mrs. Thuillard argued that these actions did not amount to a
19 criminal violation because the vehicle used to import the ink from
20 Canada did not qualify as a "commercial truck" as the term is defined
21 in 19 C.F.R. § 24.22(c) and therefore did not require the payment of
22 an import fee. (Ct. Rec. 116 ¶ 30). Judge Nielsen agreed with
23 Plaintiff and ruled that the vehicle at issue did not meet the
24 definition of a commercial truck as defined by the regulation because
25 it was not designed for the transportation of commercial merchandise.

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1 Judge Nielsen therefore dismissed the indictment against Mrs.
2 Thuillard.

3 Nevertheless, prior to Judge Nielsen's ruling on the regulation,
4 all Customs inspectors, including Mrs. Thuillard, collected the proper
5 paperwork and fee from those making commercial importations,
6 regardless of the type of vehicle being used. (Ct. Rec. 116 ¶¶ 22,
7 24, 25). At the time that SSA Anderson testified before the grand
8 jury, there had never been a judicial finding limiting the fee to only
9 commercial vehicles; therefore, the issue presented in Mrs.
10 Thuillard's motion to dismiss the indictment was an issue of first
11 impression. (Ct. Rec. 116 ¶ 30). SSA Anderson properly informed the
12 grand jury to the best of his knowledge of the standard procedures for
13 the importation of commercial merchandise. The grand jury based its
14 finding of probable cause on SSA Anderson's information, which was
15 consistent with the standard practice and procedure for Customs at
16 that time.

17 It is significant to note that, while Plaintiff relies on Judge
18 Nielsen's holding that the fee did not apply to their vehicle, it is
19 undisputed that Plaintiff did not assert this argument prior to the
20 indictment. Instead of arguing that she and her husband had not paid
21 the fee because no fee was due, a position that would have been
22 consistent with their argument that probable cause never existed for
23 the indictment, Mrs. Thuillard maintained that she had declared the
24 ink and paid the fee. It is thus logical to assume that Mrs.
25 Thuillard believed she was required to declare and pay for all
26 commercial importations, including those made in a personal vehicle.

Prior to Judge Nielsen's ruling, the belief was that the merchandise processing fee applied to commercial merchandise being imported into the United States regardless of the vehicle being utilized for importation. At the time of SSA Anderson's grand jury testimony, the legality of the merchandise processing fee rule had never been questioned. Although Judge Nielsen's later interpretation of the regulation made the facts alleged legally insufficient for a conviction, the facts were still sufficient for the grand jury to find, at that time, that they established probable cause. Accordingly, probable cause is not defeated by the dismissal of the indictment in this case.

2. Grand Jury Testimony

In order to overcome the presumption in favor of probable cause created by the grand jury indictment and make a *prima facie* case of malicious prosecution, Plaintiff must produce evidence that Defendant procured the grand jury indictment through knowingly false or fraudulent means. *Conrad*, 447 F.3d at 768 (if the "defendant knows that the facts he or she is asserting are not true, then . . . probable cause is nonexistent.") (internal quotation omitted) (italics in original); *Jones v. Jenkins*, 3 Wash. 17, 34, 27 P. 1022, 1027 (Wash. 1891) (stating that in order for malicious prosecution defendants to be found liable, the jury had to find that they willfully testified falsely). Accordingly, for Plaintiff's malicious prosecution claim to remain viable, Plaintiff must show that SSA Anderson knowingly and intentionally perjured himself before the grand jury.

1 A review of the evidence, and, in particular, SSA Anderson's
2 testimony before the grand jury (Ct. Rec. 125-2), does not establish
3 that SSA Anderson lied to the grand jury. To the contrary, SSA
4 Anderson's testimony is based on and supported by statements,
5 observations, documents and receipts.

6 SSA Anderson testified before the grand jury that, based on his
7 investigation, it was his belief that ink was purchased in Canada and
8 brought into the United States without being declared by Plaintiff.
9 (Ct. Rec. 125-2 at 289-290). He stated that Mrs. Thuillard, as a
10 Customs Inspector, would have known that a \$5 merchandise processing
11 fee would have to be paid with respect to the importation of the ink.
12 (Ct. Rec. 125-2 at 291-292). Yet, a comprehensive record search
13 performed by Customs revealed no record of any items imported by Mrs.
14 Thuillard or her husband during the relevant time period. (Ct. Rec.
15 125-2 at 285-286).

16 SSA Anderson's testimony is fully supported. Customs Inspector
17 Todd Hopkins observed the actual importation on December 10, 1998,
18 stating that he observed Mrs. Thuillard assist her husband in
19 transferring boxes purportedly containing the ink from one car to
20 another without declaring it, filing the necessary forms or paying the
21 merchandise processing fee. (Ct. Rec. 116 ¶¶ 4-9). Michael Pazurik,
22 the Canadian who sold the ink in question, describes his business
23 dealings with the Thuillards and establishes the date of the
24 importation with a dated sales invoice. (Ct. Rec. 116 ¶¶ 10-19).
25 Port Director Thomas Whalen performed a comprehensive record search
26 for the relevant time period but did not find any importation forms

1 completed by Mrs. Thuillard or her husband. (Ct. Rec. 116 ¶¶ 22-23).
2 Customs Inspector Joanne Day states that Mrs. Thuillard provided her
3 with ink refilling services in December of 1998, and Customs Inspector
4 Jean MacLeod states that Mrs. Thuillard provided her with ink
5 refilling services in the fall of 1999. (Ct. Rec. 116 ¶¶ 24-25).

6 Plaintiff's allegations do not contradict the facts relied upon
7 by SSA Anderson or show that the testimony given by SSA Anderson to
8 the grand jury was knowingly false.

9 Plaintiff asserts that the boxes transferred on December 10,
10 2008, were flooring tiles rather than ink. (Ct. Rec. 122 at 5).
11 However, Plaintiff presented no proof that SSA Anderson knew the
12 contents of the boxes and lied about it. SSA Anderson inferred what
13 was in the boxes based upon the statements from Mr. Pazurik and Mr.
14 Hopkins as well as Mr. Pazurik's dated sales invoice.

15 Plaintiff asserts that Mr. Hopkins' recollection that Mr.
16 Thuillard said he had gone to Canada to drink coffee was incorrect
17 because he is a Mormon. (Ct. Rec. 122 at 5). This contention does
18 not support Plaintiff's theory of the case, nor does it establish that
19 SSA Anderson lied to the grand jury.

20 Plaintiff asserts that confirmed ink on Mr. Thuillard's hands at
21 Thanksgiving evidences an earlier importation date, a date where Mrs.
22 Thuillard was out of the state. (Ct. Rec. 122 at 6-7). The ink on
23 Mr. Thuillard's hands at an earlier time does not demonstrate that it
24 was impossible for a purchase of ink to have been made at a later
25 time, on December 10th. Ink on Mr. Thuillard's hands at Thanksgiving
26 does not contradict the facts relied upon by SSA Anderson and

1 presented to the grand jury. SSA Anderson's testimony, as noted
2 above, is supported. Again, there is no showing by Plaintiff that SSA
3 Anderson knowingly and intentionally perjured himself before the grand
4 jury.

5 Plaintiff alleges that Mr. Pazurik indicated that Mr. Thuillard
6 picked up the ink in question in November 1998. (Ct. Rec. 95 at 7).
7 However, as noted by Defendant, Mr. Pazurik later clarified the
8 earlier statement. Mr. Pazurik informed SSA Anderson that the order
9 was taken from Mrs. Thuillard in November of 1998 and that Mr.
10 Thuillard took possession of the ink in December of 1998. (Ct. Rec.
11 116 ¶¶ 17-19). Mr. Pazurik provided a business record and an
12 explanation to corroborate this statement. *Id.*

13 Plaintiff also argues that Mr. Pazurik was coerced by Defendant
14 to offer false statements. (Ct. Rec. 95 at 16). This argument is
15 unsupported, and multiple declarations provided By Mr. Pazurik
16 indicate that no coercion occurred.

17 Plaintiff contends that false testimony was presented to the
18 grand jury when it was alleged that Plaintiff failed to pay a tariff
19 on the ink in question. Apparently, Plaintiff contends that
20 utilization of the word "duty" must be interpreted to mean a "tariff."
21 However, the grand jury was never informed that Plaintiff failed to
22 pay a tariff in this case. A review of the grand jury transcript
23 reveals that SSA Anderson testified that if the proper duty had been
24 paid with respect to the boxes of ink, the duty would have been "a \$5
25 merchandise processing fee." (Ct. Rec. 125-2 at 291). This is the
26 only "duty" SSA Anderson testified was owing, not a tariff.

1 Plaintiff's supplemental memorandum filed on September 8, 2008,
2 argues that SSA Anderson lied to the grand jury by informing them that
3 a \$5.00 merchandise processing fee was chargeable on the importation
4 of ink. (Ct. Rec. 127). While Judge Nielsen dismissed the indictment
5 against Mrs. Thuillard on this issue, at the time of SSA Anderson's
6 testimony before the grand jury, Customs officers routinely assessed
7 this fee on all commercial merchandise without regard to whether it
8 was imported in a commercial vehicle. Accordingly, at most, SSA
9 Anderson's testimony was inaccurate after the fact. It was certainly
10 not a knowingly and intentional false statement.

11 The evidence before the Court reveals that there is no genuine
12 dispute that SSA Anderson's testimony before the grand jury was
13 truthful. SSA Anderson's testimony is based on and supported by the
14 statements and observations of several witnesses as well as documents
15 and receipts. Plaintiff's version of the evidence, at most, shows
16 that SSA Anderson may have been mistaken in some of his factual
17 beliefs. However, Plaintiff's pleadings do not contradict the
18 material facts disclosed to the grand jury by SSA Anderson. Plaintiff
19 fails to provide proof that the testimony given by SSA Anderson to the
20 grand jury was knowingly false. As such, the probable cause
21 presumption is not overcome and Plaintiff's cause of action for
22 malicious prosecution must be dismissed.

23 **B. Malice**

24 Even if Plaintiff was able to prove that there was no probable
25 cause for the institution or continuation of the prosecution, the
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1 facts demonstrate that Defendant did not initiate or continue the
2 proceedings through malice.

3 It is not sufficient for a malicious prosecution plaintiff to
4 establish only that a prosecution lacked probable cause. A plaintiff
5 must also establish that the prosecution was initiated with malice,
6 which "has a broader [legal] significance than that which is applied
7 to it in ordinary parlance." *Peasley v. Puget Sound Tug & Barge Co.*,
8 13 Wash. 2d 485, 502, 125 P.2d 681, 689 (1942). "Impropriety of
9 motive may be established in cases of this sort by proof that the
10 defendant instituted the criminal proceedings against the plaintiff:
11 (1) without believing him to be guilty, or (2) primarily because of
12 hostility or ill will toward him, or (3) for the purpose of obtaining
13 a private advantage as against him." *Id.* (Citations omitted). While
14 malice may be inferred from a showing of lack of probable cause, it is
15 not a necessary deduction from this circumstance. *Bender*, 664 P.2d at
16 501.

17 To prevail on her malicious prosecution claim, Plaintiff must
18 prove malice by presenting evidence that SSA Anderson sought the
19 indictment against Mrs. Thuillard without believing her to be guilty,
20 primarily because of hostility or ill will toward her, or for the
21 purpose of obtaining a private advantage against her. *Peasley*, 125
22 P.2d at 689. Plaintiff has not produced evidence establishing that
23 any of these reasons motivated the decision to seek an indictment. In
24 fact, Plaintiff has not even speculated on what basis SSA Anderson or
25 the Office of Internal Affairs might have had to harbor hostility or
26 ill will toward Mrs. Thuillard. There has been no showing that

1 Defendant's decision to seek an indictment and maintain the
2 prosecution of Plaintiff was based on personal hostility or ill will
3 toward Mrs. Thuillard. Plaintiff has made no factual showing which
4 raises an objectively reasonable inference or colorable claim of
5 malice. Therefore, Plaintiff's claim of malicious prosecution fails,
6 as a matter of law, based on the element of malice as well.

7 **CONCLUSION**

8 Plaintiff bears the burden of proving that the grand jury
9 received knowingly false testimony in order to overcome the
10 presumption in favor of probable cause created by the grand jury
11 indictment. Plaintiff is not able to show that Defendant procured the
12 grand jury indictment through knowingly false or fraudulent means.
13 Moreover, even if Plaintiff was able to overcome the presumption that
14 probable cause existed, the facts demonstrate that Defendant did not
15 initiate or continue the proceedings through malice. Plaintiff is not
16 able to establish that the prosecution of Mrs. Thuillard lacked
17 probable cause or was instituted through malice. Accordingly,
18 Defendant is not liable, as a matter of law, for Plaintiff's malicious
19 prosecution claim.

20 The Court being fully advised, **IT IS HEREBY ORDERED as follows:**

21 1. Defendant's Motion for Summary Judgment (**Ct. Rec. 113**) is
22 **GRANTED**.

23 2. Plaintiff's Motion for Summary Judgment (**Ct. Rec. 94**) is
24 **DENIED**.

25 3. Judgment shall be entered in favor of Defendant and
26 Plaintiff's action shall be dismissed in its entirety.

IT IS SO ORDERED. The District Court Executive is hereby directed to enter this order, provide copies to Plaintiff and counsel, enter judgment in favor of Defendant and close the file.

DATED this 29th day of September, 2008.

S/Fred Van Sickle
Fred Van Sickle
Senior United States District Judge